IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 4022/16

In the matter between:

T M Applicant

And

L M Respondent

Coram: Koen J
Heard: 24 June 2016
Delivered: 20 July 2016

O R D E R

The application is dismissed with costs, such costs to include all costs previously reserved.

J U D G M E N T

KOEN J

INTRODUCTION:

[1] The Applicant applies for an order that:

> '(1) The subpoena *ducus tecum*[1] issued on behalf of the Respondent and dated 12 April 2016, served on Investec Private Bank, be and is hereby declared invalid and set aside.
> (2) The Respondent is directed to pay the costs of this Application.'

POINT *IN LIMINE*: AUTHENTICATION:

[2] The Respondent raised as a point *in limine,* and argued that the Applicant's founding affidavit and her replying affidavit are not properly attested and authenticated as required by rule 63.

[3] The founding affidavit was signed at Nambour, Australia on 26 April 2016. The replying affidavit was signed at Buddina, Australia on 25 May 2016. In each instance the affidavits were attested by a Commissioner of Oaths:

(a) who certified that the Applicant signed the affidavits 'after the provisions of the regulation contained in Government Notice No 1258 published in Government Gazette No R3619 dated 21st July 1972 had been complied with'; and

(b) who *ex facie* the official stamp affixed below the signature of the 'Commissioner of Oaths' held the office of 'JUSTICE OF THE PEACE (QUALIFIED), DEPARTMENT OF JUSTICE AND ATTORNEY GENERAL'.

[4] In the final paragraph of the founding affidavit the Applicant states the following:

'29.

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[1] It should read '*duces tecum'*.

I live some distance from the closest South African High Commissioner and given the time constraints and the fact that Monday 25 April 2016 is a public holiday in Australia, I will not be able to depose to my affidavit before such High Commissioner. In the circumstances I will depose to my affidavit before a person before whom affidavits are deposed to in Australia and this will be certified on my affidavit by such person. I mention that I have been advised by Estelle de Wet (her attorney in South Africa) that in the matter involving R. M., it was specifically agree by her and the Applicant's attorney that the affidavits to which R. M. may have to depose in those proceedings could be commissioned in this way.'

[5] The relevant part of rule 63 of the Uniform Rules of Court provides:

'(1) In this rule, unless inconsistent with the context –
'document' means any deed, contract, power of attorney, affidavit or other writing, but does not include an affidavit or solemn or attested declaration purporting to have been made before an officer prescribed by section *eight* of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act 16 of 1963);
'authentication' means, when applied to a document, the verification of any signature thereon.

(2) Any document executed in any place outside the Republic shall be deemed to be sufficiently authenticated for the purpose of use in the Republic if it be duly authenticated at such foreign place by the signature and seal of office-

(a) of the head of a South African diplomatic or consular mission or a person in the administrative or professional division of the public service serving at a South African diplomatic, consular or trade office abroad; or

(b) of a consul-general, consul, vice-consul or consular agent of the United Kingdom or any other person acting in any of the aforementioned capacities or a pro-consul of the United Kingdom;

(c) of any Government authority of such foreign place charged with the authentication of documents under the law of that foreign country; or

(d) of any person in such foreign place who shall be shown by a certificate of any person referred to in paragraph (a), (b), or (c) or of any diplomatic or consular officer of such foreign country in the Republic to be duly authorised to authenticate such document under the law of that foreign country; or

(e) of a notary public in the United Kingdom of great Britain and Northern Ireland or in Zimbabwe, Lesotho, Botswana or Swaziland or

(f) of a commissioned officer of the South African Defence Force as defined in section *one* of the Defence Act, 1957 (Act 44 of 1957), in the case of a document executed by any person on active service.

(2A) Notwithstanding anything in this rule contained, any document authenticated in accordance with the provisions of the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents shall be deemed to be sufficiently authenticated for the purpose of use in the Republic where such document emanates from a country that is a party to the Convention.'

[6] The attestation of both the founding and replying affidavits in their original form, did not comply with the provisions of rule 63. After the Respondent raised the lack of proper authentication, the Applicant on 10 June 2016 filed copies of her 'authenticated founding and replying affidavits.' Both her founding and replying affidavits now contain a further endorsement in manuscript at the end thereof in the following terms:

> 'Resworn by T. M this 7th June 2016.
> I hereby certify that the Deponent had acknowledged that she knows and understands the contents of this Affidavit which was signed and sworn to before me at KAWANA Queensland on this 7th day of June 2016'.

The affidavits and the Applicant's signatures are then attested to by one Alan Charles Parry described as a Notary Public at KAWANA and his seal as Notary Public is appended. Below that appears an 'Apostille' with an official stamp of the 'DEPT OF FOREIGN AFFAIRS AND TRADE: BRISBANE' certifying the authenticity of Mr Parry's signature, the capacity in which he signed the document and his seal or stamp.

[7] By the time the application came to be argued before me the only remaining issue between the parties in respect of the point *in limine* was whether Australia was a member to the Hague Convention as contemplated by rule 63(2A).[2] The parties agreed to place further documentation before me in regard to this issue.

[8] I was subsequently advised by the Applicant's attorney, with reference to the Hague Convention website at http://www.hcch.net that Australia is a member to the Convention. This has now been accepted by the Respondent's attorney. *Prima facie*, and on what has been produced to me, that conclusion appears correct.

[9] I however in any event also always have a discretion in terms of the provisions of rule 63(4) to accept the affidavits as sufficiently authenticated, even if it not in strict compliance with the provisions of rule 63, if it shown to

[2] It seems that it might not have been one of the original signatories thereto.

my satisfaction 'to have been actually signed by the person purporting to have signed such document.' To the extent that my conclusion in the preceding paragraph may be incorrect, I am satisfied on what has been placed before me that the founding and replying affidavits were properly attested and signed by the Applicant. Insofar as there might also be any uncertainty whether the Justices of the Peace who originally attested the affidavits might or might not have been aware of the contents of the 'regulation contained in Government Notice No 1258 published in Government Gazette No R3619 dated 21st July 1972', I am satisfied that at least by being 'resworn' before the Notary Public, the affidavits were properly attested. Nothing further needs therefore to be said regarding the point *in limine.* Any costs relating thereto, which should be relatively minimal, should follow the result of the application.

THE SUBPOENA:

[10] The subpoena sought to be set aside by the Applicant is one issued out of the Office of the Registrar of this Court on 12 April 2016 under Case No. 8938/2012. Case no 8938/2012[3] is the divorce action pending between the Respondent and her husband.[4] The subpoena is directed to the Manager of the Legal Department of Investec Private Bank and calls for the production of:

> '(1) any and all bank statements;
> (2) together with any and all documents, vouchers, invoices, etc. relating to any and all transactions thereon, from 01 January 2015 to date; in respect of
> (3) any and all current accounts, cheque accounts, savings accounts, home loans, credit cards, garage cards, business accounts, shares or investments, held in the name of, or under the effective control of T. M, identity No. [7…….], whether held directly or indirectly through another banking institution'.

[11] A similar subpoena was issued and served upon Investec Wealth and Investment Management (Pty) Limited in response to which that institution furnished the Respondent's attorneys with the records pertaining to the Applicant's investment Account No. [1……..] 'for the period January 2015 to

[3] Hereinafter simply referred to as the 'divorce action' or 'the divorce'.
[4] Hereinafter referred to as 'the Respondent's husband', or Dr M.'.

date'. These records were annexed to the Respondent's answering affidavit as an annexure. They reveal that the account had an opening balance of R5 565 107.00 in January 2015 which balance, as described by the Respondent, by virtue of a variety of large transactions involving the present Applicant's Investec Private Bank Account, increased during the course of the next fourteen months to the point when on 1 April 2016, R21 528 087.00 stood to the Applicant's credit in that account alone, in other words the Applicant increased her investment in that account during the course of 2015 and the early part of 2016 by approximately R16 000 000.00.

[12] The Respondent is highly suspicious that the sudden increase in the balance on that account may include funds belonging to her husband, to which she may have a valid claim and which are sought to be placed beyond her reach and possibly the jurisdiction of the court hearing the divorce action, by being channelled through the Applicant's account. In that regard there is also currently an anti-dissipation application brought by the Respondent against *inter alia* the present Applicant and the Respondent's husband which remains pending.

THE APPLICABLE LEGAL PRINCIPLES:

[13] Litigants have a very wide right to subpoena witnesses relevant to a pending action. Section 35(1) of the Superior Courts Act No. 10 of 2013 provides:

> 'A party to proceedings before any Superior Court in which the attendance of witnesses or the production of any document or thing is required, may procure the attendance of any witness or the production of any document or thing in the manner provided for in the rules of that court'.

[14] This power is explained further in rule 38(1)(a) of the Uniform Rules of Court which authorises any party desiring the attendance of any person to give evidence at a trial, to '... as of right, without any prior proceeding whatsoever, sue out of the office of the registrar one or more subpoenas for that purpose'. The rule further provides that

> 'If any witness has in his possession or control any deed, instrument, writing or thing which the party requiring his attendance requires to be produced in

evidence, the subpoena may specify the document or thing and require a person subpoenaed to produce it to the court at the trial'.

[15] In terms of Rule 38(1)(b) the subpoenaed witness may be required to hand the subpoenaed material over to the registrar as soon as possible unless the witness claims it is privileged. Thereafter the parties may inspect and copy or transcribe the material in question.

[16] The right to issue a subpoena *duces tecum* as of right, is a very powerful tool in the hands of a litigant in pursuit of the truth, who wishes to place all relevant facts and documents relevant to a *lis* before a trial court. Not surprisingly then, the grounds for interfering with that right are circumscribed in restrictive terms. Section 36(5) of the Superior Courts Act 10 of 2013 provides that any judge of the relevant court may set aside a subpoena if it appears that:

'(a) (the person subpoenaed) is unable to give any evidence or produce any book, paper or document which would be relevant to any issue in such proceedings;
(b) such book, paper or document could properly be produced by some other person; or
(c) to compel the person concerned to attend would be an abuse of the process of the court'.

[17] The grounds listed in section 36(5) are not exhaustive. It has been held that at common law a High Court has an inherent power to set aside a subpoena if it is satisfied as a matter of certainty that the subpoena is unsustainable for example that the witness who has been subpoenaed will be totally unable to be of any assistance to the court[5] in the determination of the issues raised at the trial.[6] It may also set aside such a subpoena to protect itself and litigants against an abuse of its process.[7] Hence, if the court is satisfied that a subpoena amounts to an abuse of process, it should set the subpoena aside.[8] An abuse of process occurs 'where the procedure permitted by the rules of Court to facilitate the pursuit of the truth are used for a purpose

[5] That however largely corresponds to section 36(5)(a) of the Superior Court's Act 10 of 2013.
[6] *Sher v Sadowitz* 1970 (1) SA 193 (C) at 195E-F.
[7] That corresponds to section 36(5)(c) of the Superior Court's Act.
[8] *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734J – 735A and 743D and *South African Coaters (Pty) Limited v St. Paul Insurance Co* (SA) Ltd 2007 (6) SA 628 (D) paras 18 – 20.

extraneous to that object',[9] or where 'an attempt (is) made to use for ulterior purposes machinery designed for the better administration of justice.[10]

[18] The onus of proof in an application to set aside a subpoena is on the party alleging such an abuse or any other ground. It is not an onus which will lightly be found to have been discharged.[11]

THE APPLICANT'S ATTACK ON THE VALIDITY OF THE SUBPOENA

[19] The Applicant's attack on the subpoena is on the basis that:

(a) it seeks to procure evidence which is irrelevant to any issue in the divorce proceedings; and that

(b) it constitutes an abuse of the process of the Court.

Her contentions are summarised in *inter alia* the following allegations:

> '…I am not a party to the litigation and I submit that the documents which are requested are entirely irrelevant to the dispute as it appears from the pleadings, between the Respondent and R. M.. The information as to my finances is personal and confidential.'

And:

> 'It is clear to me that the Respondent is on a fishing expedition, and has no reason to believe that any of the documents subpoenaed have any relevance to the case against R. M.;

And:

> 'I submit that it is clear that what the Respondent is trying to do is to put undue personal pressure on me and on R. M., and thereby secure an advantageous settlement'.

And lastly:

> 'I submit that the issuing of the subpoena is an abuse of the process'.

These grounds shall be considered *seriatim* below.

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[9] *Beinash (supra)* at 734 F-G.
[10] *Hudson v Hudson* 1927 AD 259 at 268 and *South African Coaters (supra)* para 19.
[11] *South African Coaters (supra)* para 20.

RELEVANCE:

[20] Relevance must be determined with reference to the pleadings and not extraneously therefrom.[12]

[21] *Ex facie* the Respondents amended the Particulars of Claim in the divorce action against her husband, a retired cardiologist, she *inter alia:*

(a) claims maintenance in respect of herself in the sum of R30 000.00 per month together with all medical, dental and allied expenses, including but not limited to all costs of hospitalisation, surgical treatment and prescribed medication; and

(b) pursues a claim for a redistribution order in terms of s 7(3), read with s 7(4) and 7(5) of the Divorce Act No. 70 of 1979 as amended, that her husband 'makes payment to her or makes over to her assets to the value of R10 988 069.50 alternatively R13 267 164.50 alternatively R8 404 946.00, alternatively R9 058 990.00 alternatively such amount or such portion of the assets of the Defendant as this Honourable Court may deem just and equitable'.

The Respondent and her husband were married to each other out of community of property at Cape Town on 22 December 1968. Their marriage is therefore one of some 48 years standing and *prima facie* she should have *prima facie* prospects of success in a claim for a redistribution order and possibly maintenance. The Applicant rightly did not contend to the contrary.

[22] The quantum of the redistribution order claimed is, I was advised, based on a schedule of his assets which Dr M. has made available to the

[12] *Swissborough Diamond Mines (Pty) Limited v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 310G to 311A. That case however dealt with discovery in terms of Rule 35(3) and the complaint was founded to be 'that what the Plaintiff have endeavoured to achieve … is to foist upon the First Defendant and this Court their definition of "relevant issues"'. See also *Scott v Scott* [2006] JOL 17813 (C) at page 10.

Respondent. The completeness and correctness of that schedule however is in dispute, as is the amount of any redistribution order.

[22] In those circumstances the precise value, composition and extent and whereabouts of the Respondent's husband's estate are all relevant issues on the pleadings in the divorce action.

[23] Although the Respondent has called for discovery of all relevant documents from her husband, which discovery has been followed up by a request for further and better discovery in terms of Rule 35(3), her husband has 'claimed not to have many of his records within his possession or under his control.' Accordingly, she previously issued a subpoena *duces tecum* to Investec Private Bank in respect of his records for the period from July 2015 to the date of the subpoena. She explains that she only requested the documents from July 2015 as she at the stage of issuing the subpoena had not considered and had no grounds to suspect that there may be funds removed or hidden by her husband prior to July 2015. Her attorneys are in the process of issuing subpoenas to procure her husband's bank records for the period also between the date of his original discovery on 16 October 2013 and the end of June 2015.

[24] I did not understand Mr Stokes SC, on behalf of the Applicant, to dispute that the extent and whereabouts of the Respondents husband's estate are highly relevant in the divorce action.[13]

DOES THE SUBPOENA AMOUNT TO AN ABUSE OF PROCESS?:

[25] Mr Stokes, in seeking to discharge the onus upon the Applicant, was critical of the issue of the subpoena at the following level:

[13] There was initially a suggestion by the Applicant that in the absence of a claim in the divorce action against her claiming a dissipation and a repayment from her, for instance under the *actio Pauliana,* that the Applicant's bank records could not be relevant. That contention was rightly in my view not persisted with.

(a) He argued that nowhere was there a suggestion that the funds resulting in the increase of the Applicant's Investec Wealth and Investec account balance could have emanated from the Respondent's husband, put differently, there was no basis to find that what is in the Applicant's account is relevant to the divorce;

(b) He questioned why there should be a need to subpoena the Applicant's records when the Respondent could subpoena her husband's bank records, but had sought to do so only from the period July 2015.

[26] One must remain mindful that the Respondent bears no onus. The Respondent however points to the following factors as relevant considerations to counter the case advanced by the Applicant:

(a) Until a formal admission was made in the Applicant's founding affidavit that she is in a relationship with the Respondent's husband, no formal admission of any romantic liaison between them had previously been made;

(b) Although the Applicant contends that the relationship between her and the Respondent's husband commenced only after the breakdown of the marriage between him and the Respondent and did not contribute to the breakdown, it is clear from email communications, which are attached as annexures to the Respondent's answering affidavit, that there was an ongoing romantic relationship between the Respondent's husband and the Applicant going back to at least August 2007;

(c) The discovery of relevant documents by her husband has been deficient and his attitude towards producing relevant documents under his control has been 'cagey' suggesting reluctance to make a full disclosure on his part;

(d) Even obtaining access to his bank records remains unhelpful as 'annotations of transfers out of the account often do not reveal their destination' and that 'the annotations of the origin of the funds coming into an account are generally more detailed and useful in this regard';

(e) At the time the application was launched, the Applicant was pregnant with a child generally believed, but not yet formally admitted by the Applicant, to be that of the Respondent's husband. What had come to light however was that the Respondent's husband had paid money to the Umhlanga Fertility Clinic at a time consistent with the Applicant's state of pregnancy. On a previous occasion the application was postponed to allow the Applicant more time to obtain duly authenticated affidavits, which she was unable to do at that time apparently because she was then in the final stages of her pregnancy or had just given birth to her child. There are also suggestions[14] of the Respondent's husband having fathered an older boy with the Applicant.

(f) Notwithstanding the above, the Applicant states that she has never received any funds from the Respondent's husband into any of her bank accounts. In the light of the suspicions harboured, the objective evidence of payment to the Umhlanga Fertility Clinic and a payment made by the Respondent's husband in the sum of R176 000.00 for the removal of the Applicant's household goods to Queensland, Australia by Magna Thompson Movers, a total abdication of paternal responsibility on the part of the Respondent's husband would appear improbable and he could reasonably be expected to have made payments or contributions to her;

[14] These however remain suspicions.

(g) The Applicant has simply not explained the sources of all the funds making up the R21 000 000.00 investments held in the Investec Wealth and Investment account.

[27] The last submission in the preceding paragraph arose from a challenge issued by the Respondent in the answering affidavit that:

> 'The simplest way for the Applicant to demonstrate the claimed irrelevance of the subpoenaed bank records would be to explain the origin of the R21 000 00.00 – odd which she had managed to accumulate (R16 000 000.00 of which she accumulated in the last year) in her Investec Wealth Account. This is purely within her knowledge and entirely within her power to disclose. Neither in her attorney's correspondence, nor in this affidavit to court, does she make any attempt to do so. I submit that this suggests an adverse inference."

[28] The Applicant sought to address this challenge in reply. She even went as far as to annex, as an annexure, a document from Investec in respect of her personal account reflecting credits (but not debits) made to that account from 20 December 2014 to 10 January 2016. There are however still documents lacking which make it impossible to perform an audit trail of all funds that went to the credit of the Investec Wealth account. On what she has disclosed it would seem that she had sources of income, such as an inheritance from her father's estate, income from her professional practice as a physiotherapist, proceeds from the sale of her practices, and an amount allegedly received in respect of the sale of a car (to mention a few) which could have funded the investments in the Wealth and Investment account. The origin of funds into the Wealth and Investment account however appear in very terse terms with occasional reference to 'CR EX PVT BANK'. These would suggest credits from her private bank account. However allowing also for a withdrawal from that account, a balance of some R6 000 000.00 odd still appears to be unaccounted. Various other alleged documentary 'proof of payments' such as annexures G and H to the replying affidavit are undated, generically addressed to 'To whom it may concern' by Investec and only identify the dates and the amounts when credits were made to the Wealth and Investment account No. 1639269 from the Applicant, but without identifying the source of those funds. It is surprising, where the Applicant was prepared to provide a full list of the credits to her private account showing that

substantial amounts were received which might have funded the credits to the Wealth and Investment account, that a list for the same period of the payments from her private account showing an accounting for a full balance of R21 000 000.00 odd into the Wealth and Investment Account was not also provided.

[29] Given that background and the possibility that an investigation of her private banking records may reveal financial dealings between herself and the Respondent's husband based on their long standing romantic relationship and him *inter alia* paying for her goods to be sent overseas, it is not beyond the bounds of reasonable possibility that her bank records would be relevant and could assist in uncovering the truth in the divorce action.

[30] The Applicant has not disclosed how much other money she had taken with her from her personal funds to Australia. Clearly not all her funds could have been channelled to and remain invested in South Africa in the Investec Wealth and Investment account. She has apparently bought a house where she is living in Australia, which presumably would require bond financing. Entry into Australia for residence purposes would, at the level of probability, also require her to have certain funds available. She has not taken this court into her confidence in that regard.

[31] Subpoenaing the Respondents husband's bank accounts as a way to determine whether any part of his estate has maybe found its way into the Wealth and Investment Account of the Applicant presupposes that the sums came from his Investec Private account, or any other account of the Respondent's husband known to the Respondent. The Respondent is specific that she does not know where all his accounts are kept. Whether any of his funds from accounts possibly unknown to the Respondent were transferred into an account or accounts of the Applicant is something which the Respondent is entitled to investigate.

[32] Under the circumstances I am not persuaded that the basis upon which the subpoena has been pursued is 'obviously unsustainable'[15] or constitutes an abuse of the process of court. Experience teaches that it is not uncommon that funds are sometimes hidden in accounts of romantic partners of litigants to a divorce action. That might not have happened in this matter, but it is something which the Respondent is entitled to investigate. The Applicant has not discharged the onus of proof to achieve success in this application.

THE RULE 35(12) NOTICE:

[33] Mr Hunt SC, on behalf of the Respondent, referred me to a rule 35(12) notice calling for the production of various documents referred to in the Applicant's affidavits. He submitted that the Applicant's response thereto had been inadequate and accordingly, that the Applicant may not rely on those documents in this application.

[34] I have a difficulty with the argument that all these documents requested in the rule 35(12) notice were in fact referred to directly in the affidavits and hence whether any restriction on their use would apply. In view of the conclusion which I have reached, I do not intend considering that aspect any further.

COSTS;

[35] As regards costs, Mr Stokes argued that if the application was dismissed the costs should be reserved for determination in the divorce action, on the basis that it might emerge at the divorce trial that the subpoena was unjustified. The Applicant is however not a party to the divorce action. Mr Hunt in any event further argued that the issue before me is one whether the Respondent was entitled to use the subpoena *duces tecum* procedure available to her, irrespective of the success or otherwise that might flow from

[15] *Sher's* case supra page 196H and page 197A.

having such documents produced. I agree with the submission by Mr Hunt. I am not inclined to reserve the costs for the divorce action.

[36] The matter was adjourned on the 4th May 2016 when it was first came before this court and was opposed, to the opposed roll on 3 June 2016. The issue of a lack of proper authentication of the founding affidavit was raised right at the outset. The replying affidavit was signed on the 25 May 2016. The matter adjourned by consent on the 3rd of June 2016 as the Applicant was still attending to the authentication process which she could not complete apparently due to her being in the final stages of her pregnancy or having just given birth. As much as one has empathy for the Applicant being then in the last stage of her pregnancy or possibly just having given birth, there seems to be no reason why the proper authentication of the founding affidavit could have been attended to during the intervening period before her confinement. Certainly none has been suggested. It seems to me therefore that the costs of the adjournment on the 3 June 2016 should follow the result, indeed that all costs previously reserved should follow the result. The Respondent has been successful. The Applicant should therefore pay her costs.

[37] The application is accordingly dismissed with costs, such costs to include all costs previously reserved.

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KOEN J

Appearances

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